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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76 - 259

Cynthia Gillion - - - - - - - - - - Petitioner,

- vs -

People of the
State of Illinois - - - - - - - - - Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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INTRODUCTION

The Brief in opposition to the Petitioner's Petition for Certiorari argues that since the issue raised in the Petition for Certiorari was not properly raised in the State Courts, "it deprived the Federal Supreme Court of jurisdiction." (Page 4, Respondent's Brief in Opposition).*[1]

Since the Supreme Court of Illinois denied the Petition for Leave to Appeal without comment (Appendix 2 of Petition for a Writ of Certiorari), Respondent does have grounds to argue that the issue was never considered by the State Courts.

[1] * The Brief in Opposition does leave the improper inference that the question was never raised in the Supreme Court of Illinois. It was pointed out in the Petition for a Writ of Certiorari (at Pages 17-18), that the constitutional question was not raised before the Trial Court or before the Illinois Appellate Court. The issue was presented to the Supreme Court of Illinois in her Petition for Leave to Appeal. That Petition was denied by the Supreme Court of Illinois.

This Court's policy toward jurisdiction was well pointed out in Gila Valley Ry. v. Hall, 232 U.S. 94 (1914):

> "It is inadmissible for this Court to consider errors not fundamental in their character, which might have been, but were not, brought under Appellate Review in the Appellate Courts below." At Page 98. See also Duignan v. U.S., 274 U.S. 195, 200 (1927).

(1) The issue here presents a fundamental constitutional question readily apparent in the record which the Illinois Appellate Court reviewed and which issue it must have considered in reaching the decision it did. (2) Moreover, because of the unique circumstances of this case, the issue never had an opportunity to be adequately presented to the Trial Court or the Illinois Appellate Court.

1. The issue presented to this Court is fundamental in nature and was plain error so apparent in the Common Law Record that the Illinois Appellate Court must have considered it before reaching its decision.

This Court has granted Certiorari in cases where the issues were not presented nor considered by the Appellate Tribunals below but where the error had been fundamental in character. These cases include ones (a) where the issue was plain error and should have been apparent to the Court below. U.S. v. Tennessee and Coosa Rd., 176 U.S. 242, 256 (1899); Boykin v. Alabama, 395 U.S. 238, 241 (1969) and apparently also Shockey v. Illinois, 375 U.S. 22; See also People v. Shockey Dissenting Opinion of Justice Schaefer, 25 Ill. 2d 528 (1963); (b) where an indigent Defendant in a criminal case had not been represented by Counsel in his Petitions below nor in the filing of his original Petition for Certiorari, Pollard v. U.S., 352 U.S. 354, 359 (1957); and (c) when this Court has held that the lower Courts of necessity must have considered the narrower issue while ruling on the constitutionality of the broader statute. Terminello v. Chicago, 337 U.S. 1 (1949); Stromberg v. California, 283 U.S. 359

(1931).

Though the Petitioner's Attorney never filed Transcripts of Record in the Appellate Court (See ftnte. 2, Page 8 of the Petition for a Writ of Certiorari), the Common Law Record was available to the Appellate Court and the issue here was not only obvious from that record to the Appellate Court, but, indeed, the Court must have had to consider, at least in passing, the issue in order to reach the decision it ultimately did.

From the Common Law Record it was apparent:

1. Petitioner was found to be indigent and received an appointed Counsel for her Trial.

2. After the finding of unfitness, the Trial Court below informed Petitioner's Counsel and Petitioner that she had thirty (30) days in which to file an appeal from the date of the finding of unfitness. (See

Page 12, Petition for Certiorari, ftnte. 4).

3. No Notice of Appeal was filed for over one year after the unfitness finding.

4. Petitioner's Counsel received a Court Order for payment by the Court several months after the finding of unfitness. (See page 13, Petition for Certiorari) and hence arguably was still acting as appointed Counsel for her immediately after the finding of unfitness.

5. Petitioner's previously appointed Counsel ultimately represented the Petitioner as her retained Counsel on the Petition for Rehearing and on the appeal before the Appellate Court.

If the Transcripts were available to the Illinois Appellate Court, it could have determined that the Petitioner was apparently still indigent (although she had taken out a loan by which she paid her then retained Counsel) as of the Petition

for Rehearing. (At Page 29, Petition for Certiorari).

The Illinois Appellate Court, was unanimous in holding that the Notice of Appeal had not been filed in a timely fashion. Hence, it refused to review the records of the unfitness proceedings. However, in so ruling it had to review the Common Law Record which made clear the fact that neither the Court nor the appointed Counsel had ever, after the unfitness proceedings, inquired concerning the Petitioner's indigency. Moreover, there was no inquiry as to whether she needed some type of legal assistance to prosecute an appeal. The clear inferences from the record are that the reason that no legal action was taken for over six (6) months after the finding of unfitness was because the Petitioner simply did not have the funds to prosecute her case.

Mr. Justice Schaefer writing a dissenting Opinion in People v. Shockey, Supra, pointed out the nature of plain error in this type of case:

"To me the important question, which lies just beneath the surface of the Opinion of the (Illinois Supreme) Court, is whether or not did the Defendant receive competent representation by the Attorney that the State of Illinois appointed to represent him when that Attorney has, by his failure to take a simple procedural step, forever barred the Defendant's right to the ordinary full Appellate Review of the Trial at which he was convicted.

If we look only at the date of the Judgment of the Conviction, and at the date when the report of proceedings was filed, the conclusion follows automatically that it was not filed within the time prescribed by (Supreme Court Rules)---." (25 Ill. 2d 528, 531 (1963).

Although Shockey was a criminal case, the ultimate issue to be reviewed by this Court is whether the nature of the sanctions imposed against the Petitioner -(the permanent loss of the custody of her children) is in the nature of punitive sanctions and, hence requires at least some of the procedural safeguards of a criminal proceeding. Kennedy v. Mendoza - Martinez, 372 U.S. 144, 167, 168 (1963).

2. Because of the unique nature of the facts in this case the issue presented to this Court could not have been brought under review by either the Trial Court or the Illinois Appellate Court except by means of the Plain Error Doctrine.

The Petitioner, an indigent and unsophisticated woman, was appointed Counsel for the unfitness proceeding. This was done pursuant to Illinois Law. Ill. Rev. Stat. Ch. 37, §701-20. Her appointed Counsel never raised the issue of whether she was entitled to assistance on appeal nor did the Trial Court offer her any. Her appointed Counsel later became retained Counsel and neither as appointed nor retained counsel did he move an in expeditious fashion to protect the appellate rights of the Petitioner.

By the time the Petitioner, discovered the late filing of the Notice of Appeal, 31 December 1975, it was too late to raise the issue in any fashion. Although her punishment was great, the post conviction remedy statute is not available to "civil" litigants in Illinois. Ill. Rev. Stat.

Ch. 38, §122 (1973). Indeed, by expressed statutory provision the only manner in which a civil litigant can seek relief from a final order "after thirty (30) days from the entry thereof" is through Section 72 of the Illinois Civil Practice Act. (Ill. Rev. Stat. Ch. 110 §72 (1973)). However, this Petition must be filed "not later than two years after the entry of the Order, Judgment or Decree." (Ill. Rev. Stat. Ch. 110, §72.3 (1973)). When the Illinois Appellate Court reached its decision in December of 1975, over two years and eight (8) months had elapsed since the Judgment complained of.*[2]

[2] * The majority opinion of the Illinois Appellate Court below indicates that a parent may file something called a Petition for Restoration of Custodial Rights while the minority claims that "the natural parents can colaterally attack the validity of (an unfitness finding) by a Petition for Writ of Habeas Corpus, but the burden would not be merely one of showing that they have reformed. Opinion of Illinois Appellate Court, See Appendix 1, Page 14 (emphasis added).

However, the problem with this procedure, as the underlined portions above point out, and as the Illinois Appellate Court ultimately ruled

The only real avenue, therefore, open to the Petitioner was to sue her Attorney for malpractice. 45 A.L.R. 2d 552 and cases cited therein. See also dissenting opinion of Mr. Justice Schaefer, People v. Shockey, Supra. The irony in this situation is that a million dollar malpractice judgment would not bring the Petitioner's children back to her. However, if she received a one dollar fine or a conditional discharge in a criminal case, she would have been entitled, in Illinois, to a free transcript of

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* (cont) (albeit without the assistance of a transcript of proceedings) is that the Petitioner must somehow show that she has reformed between the finding of unfitness and the bringing of the new action. As would have been shown in the transcript of the proceedings of the Petition for Rehearing, the entire thrust of the proceeding was whether or not the Petitioner at that time (as of the Petition for Rehearing) was reformed - that is, had enough money adequately to care for her youngsters. (See Page 14, Petition for Certiorari). It is indeed difficult to demonstrate that one has reformed if, indeed, one was not unfit in the first place. And the Petitioner contends that she was convicted of unfitness on the flimsiest evidence possible. (See Pages 7-12, Petition for Certiorari).

the proceedings and appointed Counsel on appeal. Mayer v. Chicago, 404 U.S. 189 (1971), Ill. Rev. Stat. Ch. 110A, §605 (1973).

Therefore, after receiving the decision of the Illinois Appellate Court, Third District, the only practicable avenue open to the Petitioner was the one she took, seeking new Counsel and Leave to Appeal in the Supreme Court of Illinois raising the issue before that Tribunal which she subsequently raised before this Tribunal.

CONCLUSION

Because the issues presented in the Petition for a Writ of Certiorari were of such a clear, fundamental and obvious nature both to the Trial Court and to the Illinois Appellate Court previously, because the issue was subsequently raised before the Supreme Court of Illinois and because the Petitioner is without a practicable way of effectually raising the issue in any other fashion, this Court should exercise its

jurisdiction and grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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